

ISIDORE BROWN, Gent.

Appellant.

*The Right Honourable Francis, Lord
Baron of Athunry in the Kingdom of Ireland, and Denis Daly, Esq;* Respondents.

The Respondents CASE.

1673.

ANDREW BLAKE, Esq; deceased, as Mortgagee in Possession of the Lands of Drimbane, Keilnegrack and Turlagh-Garrans, in the County of Galway, and Kingdom of Ireland, under Conveyances to him for that Purpose executed by Dominick Brown (since also deceased) did in his Life-time duly claim the same before the Commissioners then appointed for the Execution of the Acts of Settlement and Explanation; and having obtained a Decree of Allowance and Certificate thereof from the said Commissioners, sued out Letters Patents of the Premisses under the Great Seal of that Kingdom, to him and his Heirs for ever.

1705.

LONG after both their Deaths, Andrew Brown (Father of the Appellant, and Heir at Law to the said Dominick Brown) filed a Bill in the Court of Exchequer in Ireland, for a Redemption of the Premisses, which he was at length decreed to, after a tedious, expensive Suit, upon Payment, not only of the Principal and Interest, but also of what had been expended in procuring the Decree, Certificate and Letters Patents to be sued out and passed as aforesaid, which, with the Costs and Charges of that Suit, amounted to near the Value of the mortgaged Premisses; and as he had been obliged to borrow the said several Sums, and had no other unsettled Estate whereby he could secure the same, so he immediately entered upon a Treaty for the Sale of the Lands in Question to Edward Wilson, Esq; to raise Money for paying off the Debts which he had so contracted: But that Treaty meeting with some Interruption, he laid aside that Design for some Time, in Hopes of being enabled to do Justice to his Creditors, by such Portion as he should receive on the Marriage of the Appellant, his eldest Son; but being disappointed in that Prospect, by the Appellant's marrying a Woman who had not brought him one Shilling Fortune, the Father then saw himself under a Necessity of executing what he had first proposed, in order to satisfy his Creditors, and provide for his younger Children. And accordingly,

24th and
25th of
Feb. 1714.

BY Deeds of Lease and Release bearing Date respectively on the 24th and 25th Days of February 1714, did for the Consideration of 600*l.* convey the said Lands to the other Respondent, Denis Daly, his Heirs and Assigns for ever; so as nevertheless that the said Andrew Brown might receive any Arrears of Rent before incur'd, as well as the May Gale or Rent then running on, in Regard that Half-year was so far advanced at the Conclusion of their Agreement.

1715.

IN some Months after the Respondent Daly had purchased the Premisses, the Appellant became a Protestant, and soon after, to supply the Want of a Fortune with his Wife, exhibited his Bill in the high Court of Chancery in Ireland, on the Acts of Parliament for preventing the further Growth of Popery against the Respondent Daly, to be decreed to the Benefit of the said Purchase, as a Protestant Discoverer, upon a Suggestion that the same was made only in Trust for the said Andrew, who was a Papist; and also against his Father, to be allowed a yearly Maintenance during his Life.

THE Respondent Daly and the said Andrew Brown, by their several Answers to that Bill, fully denied the Trust therein charged, and further insisted on the Reality of the said Sale as aforesaid; to which the Appellant replied, and they re-joined, and several Witnesses being examined, and Publication duly passed, the Cause came on to be heard on the 16th Day of February 1716, when the Court was pleased to decree, That it should be referred to Doctor Usher (then a Master of the said Court) to take an Account of the said Andrew Brown's real and personal Estate (which necessarily imported an Enquiry into the Reality of the said Sale) and also what Debts he then owed, and the Condition, Number, and other Circumstances of his Family.

IN Pursuance whereof the said Master, after many Attendances and Examinations on both Sides, made up a Report on the 3d Day of December 1717; which being excepted to by the Appellant's Father, on Account of some inconsiderable Disbursements which he had no Credit given for in the Account taken of his Personal Estate, the Cause came on again to be Heard, and afterwards Reheard on the said Report and Exceptions, when most of the Exceptions so taken to the Report being allowed, the same was referred again to the Master, who by his further, or second Report, filed the 8th Day of

July

July 1718, Certified, that the said *Andrew Brown* had Sold the Lands in Question to the Respondent *Daly* for 600*l.* but was obliged to abate 50*l.* thereof, on Account of a Deficiency of Acres, and that out of the remaining 550*l.* the said *Andrew Brown* laid out 499*l. 10s.* in Discharge of his Debts and otherwise, and that the yearly Value of all his other Estate, amounted to no more than 54*l. 19s. 6d.* for maintaining himself and a Family of Seven Children.

Cause heard on the Report and Merits. No Exceptions having been lodg'd against the said further Report on either Side, the same was made absolute; and that Cause thereon, and on the Merits again heard on the 17th of November 1718, before the late Lord Chief Baron *Gilbert*, and others then appointed Commissioners for determining Causes in the said Court of Chancery, who after a full Hearing, decreed the Appellant a yearly Maintenance of 10*l.* to be paid him out of his Father's said Estate, from the Time of his first Conversion to the Protestant Religion, but granted him no sort of Relief against the Respondent *Daly*, or against the said *Andrew Brown*, on any other Part of his said Bill.

THE Premisses lying contiguous to the Respondent, the Lord *Athunry*'s Estate, his Lordship made Proposals for purchasing the same, which the other Respondent *Daly* was the readier to accept, as these Lands had been the Occasion of frequent Disputes between them about Boundaries, which such an Agreement must put an End to: And therefore, having first settled the Price at 600*l.* did in Consideration of that Sum then, *bona fide*, paid to him by Deeds of Lease and Release bearing Date respectively, on the 9th and 10th Days of November 1716, sell and convey the Premisses to the Respondent, the Lord *Athunry* and his Heirs, who hath ever since enjoyed the same, without any Interruption or Discontinuance whatsoever.

1721. July 18. 1720. THE Appellant, after acquiescing some Years in the Decree, pronounced by the Court of Chancery upon his first Bill, being newly admitted an Attorney of the Court of Exchequer, exhibited another Bill in that Court, against the same Parties, and to the same Purpose, without any new Matter, other than that he suggests the second Purchase, made by the Respondent Lord *Athunry*, to have been also under the like Trust for his Father, or at least, with full Notice of the Appellant's Title, as disclosed in his former Bill, and therefore praying, as against his Lordship, to be decreed to the Benefit of the said Purchase.

THE Respondent *Daly*, and the Appellant's Father, put in their Answers to this Bill to the same Effect with those they had already swore in the former Cause, and the Respondent the Lord *Athunry*, by his Answer also insisted upon the Reality of his Purchase, and that the same was made for the Consideration of 600*l.* which he had, *bona fide*, paid to the Respondent *Daly*, without any Trust for him, or the said *Andrew Brown*; and he thereby also denied the least Notice of the Appellant's having exhibited any Bill in the Court of Chancery for Recovery of the Premisses, or pretending any Title thereto, till a considerable Time after his said Purchase, and that he had continued in the quiet Enjoyment of the Premisses, and the Issues and Profits thereof till that Time.

Marriage Articles dated Nov. 22. 1691. THE Cause being at Issue, several Witnesses were examin'd, but before Publication could pass, the Appellant exhibited a further or supplemental Bill, in the same Court, against the Respondents suggesting that his Father was then lately dead, and that among his Papers there had been found Articles, bearing Date November 22, 1691, made by him previous to his Marriage with the Appellant's Mother, and a Settlement executed pursuant thereto, dated Jan. 15. 1691. in Pursuance of such Articles, by which he covenanted, that in Case he should recover any Part of his antient Estate, or be restor'd by the Act of Repeal, the same should be settled to the same Uses with his other Estate in Possession. And the Appellant further suggested, that he had also found among the said Papers, the Counter-part of some Instrument or Memorandum, dated the 2d of May, 1713; by which his Father covenant'd to demise *Turlagh-Garrans* (being part of the Lands in Question) to the Respondent the Lord *Athunry* for Ninety-Nine Years, provided he had Power so to do; which provisional Clause imported his Lordship's having then had Notice of the said Articles, and some Apprehension that the said *Andrew Brown* was thereby restrained from executing any Lease beyond the Term of his own Life: And therefore praying to be decreed to the Premisses under the said Articles, as eldest Son of that Marriage.

To which Bill the Respondents put in their Answers, and thereby insisted, that the said Articles did by no means extend to the Lands in Question, but only to such as were at that time in this Appellant's Father's Possession, or to such as he had forfeited, and hoped to be restor'd to, by Virtue of the pretended Act of Repeal made in Ireland, after the late King James's Abdication: And denied they ever had the least Notice of any such Articles before; and his Lordship particularly deny'd that such provisional Clause in the said Instrument, had any Reference to the said Articles, but was only inserted by Reason of some Doubt, which the said *Andrew Brown* conceived how far he was warranted to make that Lease, by the Decree under which he had recover'd the Premisses in the Court of Exchequer.

THE Appellant replied to the said Answers, and the Respondents rejoined, and the Cause being at Issue, several Witnesses were examined, and Publication duly pass'd; after which the Cause came regularly to be heard, on Wednesday the 6th, and Friday the 8th Days of February, 1726; when it plainly appearing that the Premisses were neither expressly mentioned

mentioned, nor intended to be settled within any Words used in the Articles ; and no Notice thereof being prov'd upon either of the Respondents, the Court dismissed the Appellant's supplemental Bill, with Costs ; but directed the Respondent *Daly*, to be examined on personal Interrogatories, concerning the Reality, Consideration, and several other Circumstances, both of his own Purchase of the Premisses from the said *Andrew Brown*, and of the Sale thereof, afterwards to the other Respondent the Lord *Athunry*, to the End, that on the Return of this Answer, such further Order should be made as was fit.

BUT the Appellant, instead of exhibiting Interrogatories, declared his Resolution ofAppealing against the said Decretal Order to your Lordships; whereupon the Respondents immediately Petitioned for Re-hearing the Cause, not with any real Design of declining the Examination that had been directed, but in order to read out their whole Evidence (which they had omitted to go through on the first Hearing) and by that Means to be enabled to lay the Merits of their Case fully before your Lordships, upon an Appeal : And the Court of *Exchequer* having granted the Prayer of that Petition, were also pleased to order that the Bill filed by the Appellant in the Court of *Chancery*, the several Answers thereto, and all the Depositions of Witnesses taken in the said Cause, should be read and made use of on the said Re-hearing.

THE Cause coming on accordingly, to be re-heard on the 26th and 27th Days of *April*, 1727, both the Respondents not only submitted to be examined upon Personal Interrogatories, but also proposed, that their chief Witnesses should answer the like Interrogatories, concerning the Reality of their respective Purchases ; and at the same Time offer'd to try whatever Issue the Court should think proper to direct, in relation to any of the Matters suggested by the Appellant in the County of *Dublin*, or in any other County in the Kingdom.

THE Court approving of the Fairness and Candour of these Proposals, recommended to the Appellant to consider which of them were most for his Benefit to make Choice of, and allowed him Time for that Purpose, till the 19th of *June* following ; but upon his then rejecting them all, they were pleased to affirm the Orders made on the last Hearing ; against which Orders this Appeal is brought by the Appellant, upon Pretence, that the Court should upon the Proofs and Pleadings in the Cause, have decreed the said Lands to the Appellant, and not have dismissed his said Supplemental-Bill ; and the following Objections are made thereto on his Part.

Objection I. THAT the Appellant's Father, to secure the Lands in Question for himself, and his Popish younger Children, and in order to lessen the Appellant's Maintenance, knowing he would become a Protestant, sent for Two illiterate Persons to purchase the said Lands, for the Use of the Respondent *Daly*, and gave one of them a Crown-picce, in order that the same should be paid back to himself, as the Consideration of that Conveyance.

Answer. THE Respondent *Daly* having first agreed with the Appellant's Father for the Purchase of the said Lands, for the Sum of 600*l.* which he at the same Time gave him his Cash-Note for, payable on Demand, was suddenly called away into another Part of the Kingdom, and thereupon left the Care of drawing up the Conveyances, and seeing them executed, to *Thomas Power*, Esq; a Gentleman bred up to the Law, and his own near Relation ; and the Deeds being settled by Way of Lease and Release, were duly executed in the Presence of literate Persons, who are also subscribing Witnesses thereunto ; and the said Sum of 5*s.* was only paid as the Consideration mentioned in the Lease for a Year, in the usual and accustomed Form ; and the Payment of the greatest Part of the Purchase-Money, afterwards by the Respondent *Daly*, is made out in the clearest and most undeniable Manner, by the concurrent Evidence of the said *Andrew Brown*'s several Creditors, who at the same Time that they establish the Reality, shew also the Necessity of that Sale, without which it was impossible for him to have satisfied their respective Debts and Demands upon him.

Object II. THAT after such Sale, the said *Andrew Brown* continued in the Receipt of the Issues and Profits of the said Lands, wrote some Letters relating thereto, and was sometimes heard to declare, or at least insinuate in Conversation, that he was still Interested in the Premisses, and had Power to make any Disposition he pleased of the same.

Answer. THE first Purchase not having been concluded till so late in the Year, as the 25th of February, it was agreed that the Vendor should receive the ensuing May Rent, as well as what Arrears had incurred before ; and it is not attempted to be proved, that the Appellant's Father ever received one Shilling besides out of the Premisses, neither do any of his Letters or Declarations, even as they are proved on the Appellant's Part, seem to import any thing beyond that ; but if they did, yet the same ought not to affect the Respondents, after the unquestionable Proofs given of his having been paid the full Consideration of the Purchase, and their constant Enjoyment of the Premisses since that Time ; and 'tis most humbly submitted to your Lordships Consideration, how far the setting up such loose Hear-say Evidence in Opposition to written Evidence, and notorious Facts, must in Time render Property precarious, introduce Confusion, and encourage Perjury in that Kingdom ; the Danger whereof may be observed in this very Cause, by the Consideration, which is sworn expressly to have been promised to the Appellant's Brother (and one of his principal Witnesses) for giving Evidence in this Cause ; and also by an Attempt of the like Nature, made upon another Witness, which he had Virtue enough to resist.

THEY

Object. III. THAT pending the Appellant's first Suit in the Court of Chancery, for the Recovery of the Premisses, as a Protestant Discoverer, the Respondent, the Lord Athunry, purchased the same from the Respondent Daly, in Trust also for the Appellant's Father, and with Notice of the Suit then depending, or at least with full Notice of the Marriage-Articles, under which the Apellant was well intitled, and ought to have been decreed to the Premisses upon his Supplemental-Bill, as eldest Son of that Marriage.

Answer.

It is humbly apprehended, that there has not been the least Proof offer'd to shew any Trust on the first Purchase made by the Respondent Daly, but if there had, the Respondent the Lord Athunry, in his Answer to the Original Bill, expressly denies the having ever had any Notice of the same, or of any Bill exhibited by the Appellant for the Recovery of the Premisses, till after his own Purchase, the Reality whereof he has made out beyond Contradiction, both by the Consideration paid to the Respondent Daly, and by his Lordship's having ever since enjoyed the Premisses, and received the Profits thereof to his own Use; notwithstanding which, the Respondent proposed to put the Merits of the whole Cause upon any Issue, in any County, the Court below should please to direct, which the Appellant could not reasonably have refused, but from a Despair of ever succeeding before any Jury acquainted with, or who might enquire into the Characters of the Witnesses, and other Circumstances of the Evidence produced in this Cause; nor is there any Colour for suggesting, that the exhibiting such Bill in the Court of Chancery, amounted to constructive Notice of the Appellant's Title to the Premisses, since he never made out any, but on the contrary, it was fully proved in that Suit he had none, and the Court of Chancery gave no Relief to the Appellant as against the Respondent Daly.

NEITHER ought the Court of Exchequer to have decreed the Appellant any Relief upon the Marriage-Articles, for that his Father was not then in Possession of the Premisses, and the Lands therein-mentioned, were only such as might be recovered under the pretended Act of Repeal, according to the known and general Method used by Papists for Settling their ancient forfeited Estates in that Kingdom; and the rather, for that the Respondent, the Lord Athunry, by his Answer to the Appellant's Supplemental-Bill, hath fully denied any Notice of such Articles, and there is no Proof made of the contrary on the Appellant's Part.

WHEREFORE the Respondents humbly hope, the said Orders shall be affirmed by your Lordships, and the Appellant's said Appeal dismissed with exemplary Costs.

P. Y O R K E,
A B E L K E T E L B E Y.

ISIDORE BROWN, Gent. Appellant.
 The Right Hon. Francis, Lord Baron of Athunry, in the Kingdom of Ireland, and Denis Daly, Esq;

The Respondents CASE.

To be heard at the Bar of the House of Lords, on Friday the 20th Day of February, 1729.

affirmed with 40. Costs

